

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of        }  
   }  
ESTATE OF RICHARD P. DeSMET,           }  
DECEASED, AND THELMA DeSMET          }

For Appellants: Archibald M. Mull, Jr,  
Attorney at Law

For Respondent: James W. Hamilton  
Acting Chief Counsel

Kendall Kinyon  
Counsel

O P I N I O N

These appeals are made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of the Estate of Richard P. DeSmet, Deceased, and Thelma DeSmet against proposed assessments of additional personal income tax for the years and in the amounts as follows:

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<u>Years</u>	<u>Amounts</u>
1954	\$5,218.61
1955	677.01
1956	370.23'
1957	491.00
1958	478.12
1959	1,036.60
1960	546.61
1961	242.27
1962	1,386.96
1963	1,281.59
1964	1,100.23
1965,	898.59
1966	247.57

Richard and Thelma DeSmet, husband and wife, filed joint **return6** for all years on appeal. Mr. DeSmet, as an individual and in partnership, owned pinball and other coin operated amusement machines which were furnished for use in various cigar **stores**, bars, cafes and similar locations in Sacramento County. In its brief, respondent stated that some of the machines "...were of the -illegal 'bingo-type'..." and indicated that illegal cash payouts had been made for games won by players of the machines.

Having concluded that Mr. DeSmet's pinball machine activities were illegal, respondent, acting pursuant to section 17297 (formerly section 17359) of the Revenue and Taxation Code, denied certain business deductions claimed for the operation of the machines. Section 17297 provided:

In computing taxable income, no deductions shall be allowed to any taxpayer on any of his gross income derived from **illegal activities** as defined in Chapters 9, 10 or 10.5 of **Title 9** of Part 1 of the Penal Code of California; nor shall any deductions be allowed to any taxpayer on any of his gross income derived from any other activities which tend to promote or to further, or are connected or **associated with, such** illegal activities. <sup>1/</sup>

1/ Amendments to this section in 1965 do not alter the conclusions reached in this opinion.

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Respondent also estimated the amount of the alleged payouts during each of the years and added these amounts **to gross** income. Respondent then issued the proposed assessments of additional tax here in issue.

Appellants deny engaging in illegal activity and deny making any illegal cash payouts. They assert that in order to invoke the provisions of section 17297, respondent must first establish the existence of illegal activity. We agree. Recent decisions of this board have imposed just such a duty on respondent in similar situations. (Appeal of Richard E. Hummel and Belle Hummel, formerly Belle McLane, Cal. St. Bd. of Equal., March 8, 1976; Appeal of Blankenship Novelty Co., Cal. St. Bd. of Equal., March 8, 1976.)

As in both the Hummel and Blankenship cases, respondent has failed here to make **this initial** showing of illegal activity. Other than its own unsupported statements, respondent has offered no evidence to show either that some of Mr. DeSmet's machines were of **the** "illegal bingo-type" or that illegal cash payouts were made. Since respondent has failed to sustain its burden of presenting prima facie evidence of illegal activity, we have no alternative but to reverse its actions.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, **ADJUDGED** AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest<sup>8</sup> of the Estate of Richard P. **DeSmet**, Deceased, and Thelma **DeSmet** against proposed assessments of additional personal income tax in the following amounts for the years specified, be and the same is hereby reversed:

<u>Years</u>	<u>Amounts</u>
1954	\$5,218.61
1955	677.01
1956	370.23
1957	491.00
1958	478.12
1959	1,036.60
1960	546.61
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1962	1,386.96
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Done at Sacramento, California, this 6th day of January, 1977, by the State Board of Equalization.

*William B. Brown*, Chairman  
*George Henry*, Member  
*Ira S. Sney*, Member  
\_\_\_\_\_, Member  
\_\_\_\_\_, Member

ATTEST: *W. W. Kuntz*, Executive Secretary